

Items, shall be used by the contracting officer when issuing written solicitations and awarding contracts and placing orders for commercial items. This form contains the information necessary for solicitations and contracts. The form may also be used for documenting receipt, inspection and acceptance of commercial items. Other forms shall not be used for solicitation or award of contracts or orders for the acquisition of commercial items.

#### **12.205 Offers.**

(a) Where technical information is necessary for evaluation of offers, agencies should, as part of market research, review existing product literature generally available in the industry to determine its adequacy for purposes of evaluation. If adequate, contracting officers shall request existing product literature from offerors of commercial items in lieu of unique technical proposals.

(b) Contracting officers should allow offerors to propose more than one product that will meet a Government need in response to solicitations for commercial items. The contracting officer shall evaluate each product as a separate offer.

(c) Contracting officers may, considering the circumstances described in 5.203(b), allow fewer than 30 days response time for receipt of offers for commercial items.

#### **12.206 Use of past performance.**

Past performance should be an important element of every evaluation and contract award for commercial items. Contracting officers should consider past performance data from a wide variety of sources both inside and outside the Federal Government in accordance with the policies and procedures contained in subpart 9.1, section 13.106-2, or subpart 15.6, as applicable.

[60 FR 48241, Sept. 18, 1995, as amended at 61 FR 39192, July 26, 1996]

#### **12.207 Contract type.**

Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. Indefinite-delivery contracts (see subpart 16.5) may be used where the prices are

established based on a firm-fixed-price or fixed-price with economic price adjustment. Use of any other contract type to acquire commercial items is prohibited.

#### **12.208 Contract quality assurance.**

Contracts for commercial items shall rely on contractors' existing quality assurance systems as a substitute for Government inspection and testing before tender for acceptance unless customary market practices for the commercial item being acquired include in-process inspection. Any in-process inspection by the Government shall be conducted in a manner consistent with commercial practice.

#### **12.209 Pricing of commercial items when contracting by negotiation.**

(a) When contracting by negotiation for commercial items, the policies and procedures in part 15 shall be used to establish the reasonableness of prices.

(b) The provisions and clauses prescribed in this part for the acquisition of commercial items do not include the provisions and clauses prescribed in part 15 because they assume prices for commercial items will either

(1) Not be subject to the Truth in Negotiations Act because the contract price is below the dollar threshold for application of the Act; or

(2) Be based upon one of the exceptions to cost or pricing data requirements contained in 15.804-1(a)(1).

(c) If the contracting officer determines it is appropriate to use the commercial item exception to cost or pricing data requirements (see 15.804-1(a)(2)), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.

(d) If the contracting officer is required to obtain cost or pricing data (see 15.804-1(b)(4) and 15.804-2), the provisions and clauses prescribed in 15.804-8 and 15.106 for this purpose shall be inserted in an addendum to the solicitation and contract.

(e) When a contract is priced using the exceptions at 15.804-1(a)(1), no cost or pricing data may be obtained for modifications unless the proposed modification would change the contract from a contract for a commercial

item to a contract for other than a commercial item (see 15.804-1(b)(6)). If the exceptions at 15.804-1(a)(1) are not used, the contracting officer may be required to obtain cost or pricing data to determine the reasonableness of prices for subsequent modifications (see 15.804-2(a)(1)) and the contracting officer shall insert the provisions and clauses prescribed for this purpose in an addendum to the solicitation and contract.

#### **12.210 Contract financing.**

Customary market practice for some commercial items may include buyer contract financing. The contracting officer may offer Government financing in accordance with the policies and procedures in part 32.

#### **12.211 Technical data.**

Except as provided by agency-specific statutes, the Government shall acquire only the technical data and the rights in that data customarily provided to the public with a commercial item or process. The contracting officer shall presume that data delivered under a contract for commercial items was developed exclusively at private expense. When a contract for commercial items requires the delivery of technical data, the contracting officer shall include appropriate provisions and clauses delineating the rights in the technical data in addenda to the solicitation and contract (see part 27 or agency FAR supplements).

#### **12.212 Computer software.**

(a) Commercial computer software or commercial computer software documentation shall be acquired under licenses customarily provided to the public to the extent such licenses are consistent with Federal law and otherwise satisfy the Government's needs. Generally, offerors and contractors shall not be required to—

(1) Furnish technical information related to commercial computer software or commercial computer software documentation that is not customarily provided to the public; or

(2) Relinquish to, or otherwise provide, the Government rights to use, modify, reproduce, release, perform, display, or disclose commercial com-

puter software or commercial computer software documentation except as mutually agreed to by the parties.

(b) With regard to commercial computer software and commercial computer software documentation, the Government shall have only those rights specified in the license contained in any addendum to the contract.

#### **12.213 Other customary commercial practices.**

It is customary practice in the commercial marketplace for both the buyer and seller to propose terms and conditions for a given transaction, each written from their particular perspectives. The terms and conditions prescribed in this part 12 seek to balance the interests of both the buyer and seller. These terms and conditions are generally appropriate for use in a wide range of acquisitions. However, market research may indicate other customary commercial practices that are appropriate for the acquisition of the particular item. These practices should be considered for incorporation into the solicitation and contract if the contracting officer determines them appropriate in concluding a business arrangement satisfactory to both parties and not otherwise precluded by law or executive order.

### **Subpart 12.3—Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Items**

#### **12.300 Scope of subpart.**

This subpart establishes provisions and clauses to be used when acquiring commercial items.

#### **12.301 Solicitation provisions and contract clauses for the acquisition of commercial items.**

(a) In accordance with Section 8002 of Public Law 103-355 (41 U.S.C. 264, note), contracts for the acquisition of commercial items shall, to the maximum extent practicable, include only those clauses—

(1) Required to implement provisions of law or executive orders applicable to the acquisition of commercial items; or